Petition

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NO. 81-1991

THE UNITED STATES SUPREME COURT

OCTOBER 1981 TERM

STEVEN E. BRAND

VERSUS

BOISE SOUTHERN COMPANY
OF DERIDDER, LA

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Whether it is a legitimate non-discriminatory reason for failing to reinstate an injured employee who was on leave recovering from a job-related mental disorder that the employee's doctor did not give and "unconditional" release and predicted a substantial probability of relapse while employees with physical injuries are allowed to return before they are completely healed and "unconditionally" released?

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW	1
TABLE OF CONTENTS	2
TABLE OF AUTHORITIES	3
JURISDICTIONAL GROUNDS	3
STATUTES INVOLVED	4
STATEMENT OF THE CASE	4
ARGUMENT	9
CONCLUSION	15
ENTRY OF APPEARANCE	15
CERTIFICATE OF FILING	16
CERTIFICATE OF SERVICE	17
APPENDIX	18

TABLE OF AUTHORITIES

42 U.S.C § 1343 (4) 9

42 U.S.C. § 1981 4

42 U.S.C. § 2000e 4

McDonnell Douglas Corp. v. Green,
411 U.S. 792 (1973) 10

JURISDICTIONAL GROUNDS

The opinion of the Fifth Circuit was rendered on January 28, 1982. The petition for rehearing was denied on February 24, 1982. Neither opinion, nor the opinion of the District Court, was reported.

This court has jurisdiction to review the judgment of the Court of Appeals by writ of certiorari under 28 U.S.C. § 1254 (1).

STATUTE INVOLVED

42 U.S.C. § 2000e-2. (a) It shall be an unlawful employment practice for an employer--

(1) to fail or refuse to hire or to discharge any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin . . .

STATEMENT OF THE CASE

This is an action brought under Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e et seq.) and under 42 U.S.C. § 1981,against an employer and a union, in the Western District of Louisiana. It was originally brought as a class action, but the class was decertified and plaintiff's

action was severed from that of the other named plaintiff. Defendant union was dismissed from the case after the plaintiff rested (this order was not appealed). After trial a final judgment was rendered in favor of defendant employer. Plaintiff filed a timely notice of appeal to the court of appeal.

Plaintiff Steven E. Brand (employee) lost a finger in a job-related accident when it became caught in a paper machine, in 1974. Later that year he returned to work in accordance with the provisions of the collective bargaining agreement between the International Paper Workers (union) and Boise Southern (employer). On returning to work he began to suffer what was diagnosed as traumatic neurosis caused by the accident which impaired his ability to work around large machinery, particularly the paper machine. He took another

medical absence and began treatment for the condition.

In late 1976 he thought himself recovered enough to resume his prior job. To this end he secured a "Return to work" release (Exhibit P-3, hereinafter referred to as the "first release") from his psychiatrist and presented to employer's personnel manager on either December 18 or 22, 1975. Employer did not allow him to return to work at that time, or after consulting with the doctor in January, 1976. Employee was told that the release was not sufficient in that he needed an "unconditional" release.

On or about May 4, 1976 employee obtained his "unconditional" release. A letter of that date from the doctor to employee's attorney described him as "symptom free" and "should be able to return to work" and did not mention any decondi-

tioning except in reference to the prior release. The letter disclaimed any prediction of whether there would be a relapse. (Exhibit Boise-5). Employee also received a handwritten note by the doctor that he "was given a full release to return to work on May 4, 1976." (Exhibit P-4). Employee testified that he received this note on or about May 4, 1976, but the court chose not to believe him on the basis that it was worded in the past tense. (These two exhibits shall be referred to collectively as the "May 4, 1976 release.") Employee testified that he delivered two copies of the short note to the personnel manager in May, 1976, but employer denied receiving either until August, 1979, and the court found the latter (employee challenges this finding as clearly erroneous).

Numerous contacts with employer were made by employee and on his behalf by the union, by his doctor, and by his attorneys, but employee was not returned to work until November, 1979, two and a half years after this suit was filed.

An EEOC charge was filed, employee received a right to sue notice, and he filed this complaint in the Western District of Louisiana. He sued both employee and union, but union was dismissed during the course of the trial, and that order was not and is not being appealed. Judgment was rendered against employee on the basis that he had not met the jurisdictional prerequisites for a Title VII suit in that his EEOC charge did not include the claims presented in the suit, that he failed to prove employment discrimination, and that his 42 U.S.C. § 1981 claim had prescribed. An appeal was then taken.

The court of appeals affirmed the decision of the district court on the grounds that employer had articulated a legitimate non-discriminatory reason for its actions in not reinstating employee until he could produce an "unconditional" release, thus precluding the necessity of deciding whether he had made out a prima facie case under Title VII or under § 1981.

The district court had jurisdiction under 42 U.S.C. § 1343 (4).

ARGUMENT

This petition raises an important question of federal law which has not been but should be settled by this Court.

The basic standard for burden of proof in a Title VII case is well established:

> The complainant in a Title VII trial must carry the initial burden under the statute of establishing a prima facie case of racial discrimination. This may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications. . . . The burden then must shift to the employer to articulate some legitimate nondiscriminatory reason for respondent's rejection."

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). This test must vary from case to case depending on the circumstances involved and the type of discrimination alleged. Id., n. 13. The instant case does not involve the initial hiring decision, as did that case, but rather involved a return to a position which the collective bargaining agreement guaranteed would be available to him. Therefore the question

of whether employer was seeking to fill the position before and after employee sought to return is not applicable here.

The crux of the test is that where a member of a protected class is denied a position or other benefit to which he is apparently entitled, the burden of proof shifts to the employer to demonstrate a legitimate reason for the denial. In this case there is no question but that employee is a member of a protected class and that he was not returned to his position after he requested reinstatement under the collective bargaining agreement. The issue is whether the reasons advanced by employer were legitimate and sufficient grounds for denying employee reinstatement to his position. Whether this is explained as a requirement on the part of employee to show that he was qualified or as an attempt to articulate a legitimate

nondiscriminatory reason makes little difference as far as this review is concerned. The question which must be answered is whether the circumstances brought out at trial were legitimate nondiscriminatory reasons for the refusal. Employee contends that they were not.

It was established that under the collective bargaining agreement and custom and practice an employee who had been absent for some length of time due to a job-related injury would be restored to his rightful position upon the presentation to employer of a doctor's release.

Employer contends that the first release presented by employee in December, 1975 was a "conditional" release and not acceptable, and that further information obtained from the doctor who wrote it indicated that there was a seventy percent chance that employee would have a relapse

if he were returned to his former job. The release indicated that employee was "recovering" and needed "deconditioning." This was not a legitimate nondiscriminatory reason for failing to return him to work. Employee's personnel manager testified that a man with a broken arm or other injury could be returned to work while still recovering even if there would be some impairment in his ability to perform his job. As to the possibility of relapse, employer's concern was not well placed. The release and information indicated that the doctor's medical opinion was that employee should have been returned to work. The possibility or probability that he would quit after an indefinite period of time was not a legitimate consideration under the collective bargaining agreement.

While Title VII does not in itself prohibit discrimination on the basis of mental condition, reliance cannot be made on such discrimination to justify covered discriminatory practices. The legitimate non-discriminatory reason that an employer must advance must actually be legitimate and non-discriminatory. It must relate to the employee's ability to perform the job functions. In the present case the evidence clearly indicated that employee could perform his job requirements. Employer's concern was whether or not employee would stay on the job or whether he would suffer a relapse and leave the job once more. This was not a legitimate concern, as the employment contract guaranteed him the job reinstatement regardless of how long he would remain on it.

CONCLUSION

A writ of Certiorari should be granted ordering the United States Court of Appeals for the Fifth Circuit to send up the record in this case for review, and after appropriate review, the decision and judgment of the Court of Appeals should be reversed.

RESPECTFULLY SUBMITTED,

HARDY M. PARKERSON
ATTORNEY FOR PETITIONER
STEVEN E. BRAND

ENTRY OF APPEARANCE

NOW INTO COURT comes HARDY M. PARKERSON, a member of the Bar of this Court, who moves that he be entered as counsel of record for STEVEN E. BRAND, petitioner herein.

HARDY M. PARKERSON
807 ALAMO STREET
LAKE CHARLES, LA 70601

CERTIFICATE OF FILING

STATE OF LOUISIANA:

PARISH OF CALCASIEU:

BE IT KNOWN that on the 23rd day of April, 1982, before the undersigned Notary Public, duly commissioned and acting and in the presence of the undersigned witnesses, personally came and appeared HARDY M. PARKERSON, who after being duly sworn, did depose and say:

> That he caused forty copies of this petition for a writ of Certiorari to be placed in the mail at the United States Post Office in Lake Charles, LA 70601, properly addressed to the Clerk of the United States Supreme Court, Washington, DC 20543 and with first-class postage prepaid, on the 23rd day of April, 1982, and to his knowledge the mailing took place on that date.

THUS DONE READ AND SIGNED at my office in Lake Charles, Louisiana in the presence of the undersigned witnesses who sign herewith, together with all parties and me,

Notary, on the date first set forth herein.:

Witnesses:

_____ _____
HARDY M. PARKERSON

_____

Before Me: _____
NOTARY PUBLIC

CERTIFICATE OF SERVICE

I hereby certify that three copies of this Petition for writ of Certiorari have been placed in the mail at the United States Post Office at Lake Charles, LA 70601, properly addressed to counsel for Boise Southern Company of Deridder, La., Norman A. Mott, III, P.O. Box 50639, New Orleans, LA 70150-0639, with sufficient first-class postage prepaid, this 23rd day of April, 1982.

_____
HARDY M. PARKERSON

Appendix

APPENDIX

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 81-3386, Summary Calendar

STEVEN E. BRAND, Plaintiff-Appellant

versus

BOISE SOUTHERN COMPANY OF

DeRIDDER, LA., Defendant-Appellee.

Appeal from the United States District Court for the Western District of Louisiana

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(JANUARY 28 , 198)

Before CLARK, Chief Judge, RANDALL and WILLIAMS, Circuit Judges.

PER CURIAM:

The appellant, a black male, alleges that he was discriminatorily denied reinstatement to his job after recovering from an injury in violation of Title VII, 42

U.S.C.A. 2000(e) et seq. and 42 U.S.C.A. § 1981. The district court, after a trial, held for the appellee Boise Southern (Boise). We affirm.

To state the facts briefly, the appellant, Steven Brand, was employed in Boise's paper plant. His job involved working on a paper machine, described by Boise as "an immense and noisy piece of industrial equipment, with hundreds of moving parts". In 1974 Brand lost a finger in an accident while working on the machine. After his injuries healed, he returned to work, but began to display symptoms of what was later diagnosed as traumatic neurosis. This condition gave him nightmares and made him fearful of working around large machinery. On the recommendation of a psychiatrist, Dr. Willis, Brand took medical leave in March, 1975.

In December, 1975, Brand sought to return to work. Boise responded that, in accordance with its usual policy, Brand had to present a total medical release. Brand then obtained a medical release from Dr. Willis which stated that Brand was "recovering from traumatic neurosis--needs to be slowly deconditioned to work." Boise inquired of Dr. Willis whether Brand was fully recovered and Dr. Willis replied that Brand had an 80% chance of relapsing should he work around the machinery at the paper mill. Treating this release as less than total, Boise declined to reinstate Brand.

Brand then retained an attorney, Wilford Carter. Carter had Brand reexamined by Dr. Willis who this time rendered an opinion that Brand was "symptom-free and should be able to return to work." Dr. Willis reported his conclu-

sions in a letter to Carter dated May 4, 1976. Apparently Carter failed to forward the letter to Brand. Instead, on behalf of Brand, Carter initiated grievance proceedings under the collective bargaining agreement and also submitted, on May 14, 1976, an Equal Employment Opportunity Commission charge that broadly alleged racial discrimination in a variety of Boise's employment practices.[1] An EEOC right-to-sue letter issued six months later. On March 11, 1977, Brand and one

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[1] The EEOC charge read as follows:

I, am STEVEN E. BRAND, an employee of Boise Southern Company. I have been so employed for quite some time. Because of discrimination witness an expericen [sic] by me and all the other black employees of this company, I submit a complaint to you seeking assistance in this problem from your office. The above company discriminated against the blacks as a class, in regard to hiring policies, promotions, job assignments, wages, discharge, reprimands, training programs and testing. Black employees have been discriminated against in all these areas.

other plaintiff filed suit in federal court. The complaint was framed as a class action and was as broad in scope as the EEOC charge. It alleged no specific facts concerning Boise's failure to reinstate Brand.[2]

In December 1977, Brand himself called Boise to renew his request for reinstatement and discovered that Boise had never received the May 4, 1976 release. Brand then obtained a handwritten note from Dr. Willis confirming Willis' earlier opinion that Brand was ready to return to work. There is a dispute concerning when Boise received this note, but it apprears that Boise did not receive it until an August, 1979 grievance hearing on Brand's claim

[2] The class allegations were dismissed with the consent of plaintiffs' counsel in 1979. The other named plaintiff settled his claim against Boise before trial of Brand's case.

for reinstatement. At that August, 1979 hearing, Boise, confronted with Brand's medical evidence, agreed to reinstate him if another psychiatrist concurred in Dr. WIllis' opinion. Brand was examined by ancther psychiatrist and was given a clean bill of health. Boise then offered Brand reinstatement on November 2, 1979, and on November 5, Brand returned back to work.

The suit came to trial in December 1980. Brand attempted to prove that Boise had denied him prompt reinstatement because of his race. The court, adopting almost verbatim Boise's proposed findings of fact and conclusions of law,[3] rendered judgment against Brand. Brand has appealed to this Court.

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[3] We note that this practice is disapproved, although it does not warrant reversal. Kincade v. General Tire & Rubber, 633 F.2d 501, 504 n.2 (5th Cir. 1981).

The district court concluded that Brand failed to establish a prima facie case under McDonnell Douglas v. Green, 411 U.S. 792 (1973). The court also concluded that even if Brand had established a prima facie case, Boise had satisfied its burden of articulating a legitimate nondiscriminatory reason to justify its action, and Brand had failed to demonstrate that his reason was a pretext for discrimination. Because we agree that Boise has shown a legitimate reason for its actions that Brand has failed to shake, we affirm.[4]

In a discriminatory treatment case such as this, if the plaintiff establishes a prima facie case of discrimination, the defendant has the burden of articulating a

[4] We therefore do not address Boise's contention that Brand's complaint in federal court exceeded the scope of the EEOC charge.

legitimate nondiscriminatory reason for its action. Texas Department of Community Affairs v. Burdine, 101 S.Ct. 1089, 1093 (1981); Dickerson v. Metropolitan Dade County, 659 F.2d 574, 580 (5th Cir. 1981). If the defendant does so, the plaintiff must persuade the trier of fact that the stated reason is merely a pretext to cloak discriminatory conduct. Burdine, 101 S.Ct. at 1093. Assuming for purposes of this appeal that Brand made out a prima facie case, we conclude that Boise has shown a legitimate reason for refusing to reinstate him and Brand has utterly failed to cast doubt on it.

Boise's witnesses testified that Brand and his attorney did not bring a complete medical release to Boise's attention until August, 1979. Until it received such a release, Boise was unwilling to reinstate Brand because an employee who might at any

moment relapse into traumatic neurosis constituted a threat to the safety of the employees who work with him. Boise's fear that Brand's return to work might touch off a new traumatic episode is a legitimate reason for declining to reinstate him.

In response, Brand argues that Boise knew of Brand's recovery long before it reinstated him, and that the district court's finding to the contrary is clearly erroneous. The district court chose to disbelieve Brand's testimony that he tendered a medical release from Dr. Willis to Boise before August, 1979. We are bound by this finding unless it is clearly erroneous. Danner v. United States Civil Service, 635 F. 2d 427 (5th Cir. 1981). Brands testimony on his delivery of the release was riddled with contradictions. The district court's refusal to credit it

and instead to believe Boise's witnesses is not clearly erroneous.

Brand also presented evidence that several employees of Boise had been reinstated more speedily than he was. none of these instances involved mental disorders, however, and in all of them but one, a complete release was tendered before the employee was reinstated. The only case in which a white employee was reinstated without a complete release occurred before Boise established the rule requiring complete releases.

None of these comparative examples persuades us that Brand was treated differently from other similarly situated employees for discriminatory reasons. Rather, the evidence shows only that Brand's reinstatement was delayed because of a lack of communication between Brand and his counsel and Boise. Once Boise

learned of Brand's improvement, it acted promptly to return him to work.

Discriminatory treatment cases are subject to the same allocation of burdens of proof whether brought under Title VII or section 1981. McWilliams v. Escambia County School Board, 658, F.2d 326, 331-32 (5th Cir. 1981). Having concluded that Brand cannot prevail under Title VII, we must hold that he fares no better under section 1981. We therefore do not reach the question whether his section 1981 claim was barred by the one year Louisiana statute of limitations, as the district court held.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION

STEVEN E. BRAND : CIVIL ACTION
VS. : NO. 770250
BOISE SOUTHERN COMPANY OF:
DeRIDDER, LA., ET AL :

JUNE 2, 1981

O P I N I O N

The trial of this matter was held before Judge Earl E. Veron on December 1, 2 and 3, 1980. Mr. Steven Brand, the plaintiff, filed this action under the provisions of 42 U.S.C. § 1981 and Title VII of the Civil Rights Act of 1964 as amended, 42 U.S.C. § 2000(3) et. seq. Named as defendants were Boise Southern Company of DeRidder, Louisiana and United Paper-

workers Internatinal Union. After plaintiff presented is case, the court granted a motion for directed verdict made by the defendant Union. We now enter findings of facts and conclusions of law on plaintiff's claim against defendant Boise Southern.

FINDINGS OF FACTS

1. Defendant Corporation Boise-Southern of DeRidder, Louisiana, Inc. is engaged in the manufacture of paper and employs in excess of fifteen (15) persons.

2. Plaintiff, Steven Brand, is a black citizen of Louisiana.

3. Plaintiff lost a part of a finger in an on-the-job injury in June of 1974. He recovered from the physical effects of the injury and was returned to work in October, 1974. He does not complain about that return to work. Shortly after his return to work in October, 1974, plaintiff

developed a mental disorder, traumatic neurosis.

4. Plaintiff's psychiatrist advised him to stop work and to seek other employment. Plaintiff's psychiatrist diagnosed that it was unlikely plaintiff could work in the situation which produced his original trauma.

5. Plaintiff filed a workmen's compensation suit claiming total and permanent disability. Plaintiff received in settlement of his claims $11,788.88.

6. Five weeks after settling his workmen's compensation claim plaintiff asked to return to work.

7. Defendant requested plaintiff to provide a doctor's release before he was returned to work. This was in accordance with the Company's standard practice. On

December 18, 1975, plaintiff brought a physician's return to work slip to defendant's personnel manager, Roy Connell.

8. The December 18, 1975 return to work slip, defendant Boise Exhibit 10(g), indicated plaintiff was "recovering" and should be "slowly deconditioned" to work. During this December 18, 1975 meeting the plaintiff discussed his condition with Mr. Connell and admitted he was still suffering from some of the symptoms of his neurosis.

9. Mr. Connell talked with plaintiff's psychiatrist, Dr. Harper F. Willis. Dr. Willis told Mr. Connell there was only a 20% chance that plaintiff would not have a relapse it he was returned to his job. Dr. Will diagnosed that a relapse could be severe enough to cause plaintiff to panic or to freeze up while on the job.

10. Based on this meeting with Dr. Willis, Mr. Connell told plaintiff on February 10, 1976 he could not be returned to work, since his doctor had diagnosed a substantial chance of relapse.

11. On February 18, 1976, plaintiff filed a grievance under the provisions of the applicable collective bargaining agreement. Plaintiff's case was heard in accordance with the standard procedures for processing grievances and was subsequently denied.

12. Some time prior to April 30, 1976, plaintiff engaged the services of an Attorney named Wilford Carter for the purpose of aiding plaintiff's return to work. On April 30, 1976 Attorney Wilford Carter contacted Connell and inquired about plaintiff's status. Connell told Carter the plaintiff could not return to work un-

til he received a full release from Dr. Willis.

13. Presumably at the suggestion of Carter, plaintiff visited Dr. Willis on or around May 4, 1976. Apparently at plaintiff's request Dr. Willis sent a letter to Carter evaluating plaintiff's condition. This letter (Defendant Boise 10ee) essentially repeated Dr. Willis' guarded prognosis of plaintiff's condition and can not be characterized as the kind of full release which defendants required. Attorney Carter did not forward this letter to the defendants. Instead, on or about May 14, 1976, Carter drafted and filed on behalf of plaintiiff a Charge of Discrimination with EEOC alleging broad class-wide discrimination by the defendants. The plaintiff's charge neither raises the issue of his return to work nor

does it raise any issue like or related to that question.

14. Plaintiff assumed that Carter had forwarded Dr. Willis' May 4, 1976 letter to the defendants until sometime in December, 1977 when he was informed to the contrary by the defendant's personnel manager during a phone conversation in which plaintiff had inquired about his status and was told that he had yet to be sufficiently released. At some indefinite point in time after being so informed, the plaintiff secured from Dr. Willis an undated handwritten note stating that "Mr. Stephen Brand was given a full release to return to work on May 4, 1976. "Defendant Boise Exhibit 10ee (emphasis added).

15. Despite plaintiff's testimony to the contrary, the court finds that the defendant did not receive nor know about that

note from Dr. Willis until August, 1979, when it and the May 4, 1976 letter to Carter, and a March 16, 1979 letter from Dr. Willis (Defendant Boise Exhibit 10gg) were presented to the defendants during a hearing to determine whether plaintiff should be returned to work. This finding is based on the testimony of Mr. Roy Connell and Mr. Wayne Parker, both of whose testimony that court finds to be many times more believable that the utterly contradictory testimony of the plaintiff concerning his alleged delivery of those documents to the defendants at some earlier time.

16. After finally receiving those documents and because of the confusion surrounding plaintiff's medical condition, the defendants agreed to allow plaintiff to return to work if another psychiatrist diagnosed him as cured. At the defen-

dant's expense, a psychiatric examination revealed that plaintiff was cured and he returned to work.

17. Defendant's temporary refusal to return plaintiff to work was because plaintiff failed to provide defendant with a medical evaluation other than one which indicated a substantial chance of dangerous relapse.

18. Defendant's temporary refusal to return plaintiff to work was based upon legitimate, non-discriminatory business reasons.

19. Had a white employee suffering from a mental disorder been diagnosed 70% likely to relapse, he would not have been returned to work in a trauma inducing environment.

20. Had a white employee suffered from similar mental disorders he would have

been required to provide a medical clearance as was plaintiff.

21. Plaintiff has not proved similarly situated white employees were treated more favorably than he.

22. Defendant had legitimate, non-discriminatory reasons for refusing to return plaintiff to work.

23. Plaintiff has not shown defendant directed any discriminatory conduct against him.

24. Plaintiff has failed to show any intent or purpose of the defendant not to return him to work because of race.

CONCLUSIONS OF LAW

1. The scope of a Title VII action must be limited to those claims which are "like or related to" the allegations of the Charge of Discrimination filed with the Equal Employment Opportunity Commis-

sion. Sanchez v. Standard Brands, Inc., 431 F.2d 455 (5th Cir. 1970). See also, Ramirez v. National Distillers and Chemical Corp., 586 F.2d 1315 (9th Cir. 1978): Hicks V. Abt Assoc., Inc., 572 F. 2d 960 (3rd Cir. 1978). Plaintiff's only claims for relief are not like or related to those claims raised in this Charge of Discrimination.

2. In Louisiana, the applicable prescriptive period for actions under 42 U.S.C. § 1981 is one (1) year. Johnson v. Railway Express Co., 421 U.S. 454 (1975); Shelley v. Bayou Metals, Inc., 561 F. 2d. 1209 (5th Cir. 1977); Page v. United States Industries, Inc., 556 F. 2d 346 (5th Cir. 1977); cert. denied, 434 U.S. 1045 (1978). Since plaintiff was aware of defendant's alleged unlawful employment practice as of February 10, 1976, and

since plaintiff did not file suit until March 14, 1977, plaintiff's claims under 42 U.S.C. § 1981 are prescribed. Delaware State College v. Ricks, 444 U.S. 1070 (1980); Evans v. United Airlines, Inc., 431 U.S. 553 (1977); See, Brackamontes v. Amstar Corp., 576 F.2d 61 (5th Cir. 1978).

3. In order to establish a prima facie case of discrimination plaintiff Brand must show: (1) He is a member of a protected minority. (2) He requested, and was qualified to return to a position with the employer. (3) He was rejected despite his requests and qualifications. (4) After his rejection the employer continued to employ persons in those positions with qualifications equal to plaintiff's. McDonnell-Douglas Corp, v. Green, 411 U.S. 792 (1973).

4. Further plaintiff must prove that defendant intended to discriminate against him because of his race. Thomas v. J. C. Penny Co., 531 F.2d 270 (5th Cir. 1976).

5. Assuming plaintiff meets this threshold burden, defendant must come forward with proper evidence establishing that legitimate, non-discriminatory reasons existed to support its actions. Texas Dept. of Community Affairs v. Burdine, __ U.S. ____, (1981); Henry v. Ford Motor Co., 553 F.2d 46 (8th Cir. 1977); Boyce v. Reynolds Metals Co., 532 F. 2d 638 (8th Cir. 1976).

6. If defendant meets this burden, plaintiff then assumes the burden of proving, by a preponderance of the evidence, that the employer's articulated reasons for the alleged unlawful conduct are a pretext for discrimination. Id.

7. Plaintiff failed to prove he requested and was qualified to return to work before 1979. Plaintiff did not offer any evidence showing or tending to show defendant intentionally discriminated against him.

8. Legitimate non-discriminatory reasons existed to support defendant's action.

9. Plaintiff did not offer any evidence showing or tending to show that defendant's articulated reasons for its actions were a pretext for discrimination.

10. Defendant did not discriminate against plaintiff in any way in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000-e et seq. or the Civil Rights Act of 1866, 42 U.S.C. § 1981.

Judgment is accordingly rendered in favor of defendant, rejecting plaintiff's

demands, dismissing the suit at plaintiff's cost.

THUS DONE AND SIGNED at Lake Charles, Louisiana, this 2nd day of June, 1981.

s/Earl E. Veron
EARL E. VERON
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 81-3386

STEVEN E. BRAND, Plaintiff-Appellant,

versus

BOISE SOUTHERN COMAPANY OF DeRIDDER, LA.

Defendant-Appellee.

Appeal from the United States District Court for the Western District of Louisiana

ON PETITION FOR REHEARING

(FEBRUARY 24, 1982)

Before CLARK, Chief Judge, RANDALL and WILLIAMS, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

Opposition

Office - Supreme Court, U.S.
FILED
MAY 24 1982
ALEXANDER L. STEVAS,
CLERK

NO. 81-1991

THE UNITED STATES SUPREME COURT

OCTOBER 1981 TERM

STEVEN E. BRAND
VERSUS
BOISE SOUTHERN COMPANY
OF DeRIDDER, LOUISIANA

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES II
STATEMENT OF THE CASE 1
SUMMARY OF ARGUMENT 2
ARGUMENT 2
CONCLUSION 5
CERTIFICATE OF SERVICE 5

TABLE OF AUTHORITIES

CASES

Brand v. Boise Southern Company, Slip Opinion 3
(W.D. La. 1981)

McDonnell-Douglas Corp. v. Green, 411 U.S. 791 (1973) 3

Pullman Standard v. Swint, 50 U.S. L.W. 4425 (U.S. 2
April 27, 1982), *rev'g* 624 F.2d 525 (5th Cir. 1980)

Texas Department of Community Affairs v. Burdine, ... 2, 3
450 U.S. 248, 101 S. Ct. 1089 (1981)

STATUTES

42 U.S.C. §2000 (e) et seq. 1

STATEMENT OF THE CASE

Plaintiff claims he was subjected to disparate treatment because of his race in violation of Title VII of the Civil Rights Act of 1964 as amended 42 U.S.C. §2000 (e) et seq. when the Defendant Employer refused to return him to work in December of 1975.

The Plaintiff had been off work because he had developed a "psychotic neurosis" as a result of a previous on-the-job accident where the Plaintiff lost a finger. When the "neurosis" was originally diagnosed the Plaintiff's psychiatrist advised that the Plaintiff would never be able to return to work in the environment which caused the original injury.[1] Subsequent to this diagnosis the Plaintiff filed for workmen's compensation benefits claiming he was totally and permanently disabled (See: Appendix to Petition, hereinafter "Appendix", at 31).

Nevertheless, in December of 1975, the Plaintiff presented himself to the Defendant's Personnel Manager asking to be reinstated to his position. The Personnel Manager was presented with a "release" from Plaintiff's psychiatrist stating the plaintiff should be "slowly deconditioned" to work. (Appendix at 32). Not understanding the psychiatrist's release, the Personnel Manager arranged a meeting with the psychiatrist. At this meeting the Personnel Manager was advised that there was an 80% chance the Plaintiff would have a relapse if he was put back to work. He further learned that should the relapse occur it could be severe enough to cause Plaintiff to "panic or to freeze up while on the job." (Appendix at 32). Based on this information the Personnel Manager decided not to allow the Plaintiff to return to his job. Plaintiff was advised of this decision. Plaintiff claims this decision was a pretext for discrimination. Both lower courts found that Plaintiff failed to offer

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[1]The Plaintiff lost his finger while working on a paper machine. This large machine has thousands of moving parts.

evidence that this was pretext. This factual finding appears to be the only issue raised by Plaintiff in his application to this Court.[2]

SUMMARY OF ARGUMENT

Both the Trial Court and the Fifth Circuit Court of Appeals appropriately applied the standards enunciated by this Court in *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248 (1981) in this case. The basis for the Employer's action in temporarily refusing to return Plaintiff to work was not a pretext for discrimination. This essentially factual finding was made by the Trial Court, is supported by substantial evidence and was specifically affirmed by the Appeals Court. The case contains no significant issue justifying issuance of a writ of certiorari.

ARGUMENT

In *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248 (1981), this Court allocated Plaintiff's burden of proof in a discriminatory treatment case under Title VII. Plaintiff initially must establish a prima facie case. Assuming a Plaintiff meets this threshold requirement, Defendant must come forward with proper evidence articulating legitimate, nondiscriminatory reasons to support its action. 450 U.S. 248, 101 S.Ct. 1089, 1093 (1981). Plaintiff then must assume the ultimate burden of persuading the trier of fact that Defendant's articulated reasons are either unworthy of credence or a pretext for discrimination. *Id.* at 1093.

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[2]In his Statement of the Case Plaintiff parenthetically challenges as clearly erroneous the Trial Court's finding that the Plaintiff did not present a "complete" release to the Company until August of 1979. (Petition at 7). However, the issue is not addressed in Petitioner's argument. The factual finding was based on the Trial Court's resolution of the credibility of the witnesses. The Appeals Court properly held the Trial Court's finding in that regard not to be "clearly erroneous." (Appendix at 27). See *Pullman Standard v. Swint,* 50 U.S. L.W. 4425 (U.S. April 27, 1982), *rev'g* 624 F. 2d 525 (5th Cir. 1980).

In order to establish his prima facie case of discriminatory treatment, Plaintiff Brand had to show:

(1) He is a member of a minority group protected by Title VII;

(2) He requested, and was qualified to return to a position with Defendant Employer;

(3) He was rejected despite his qualifications;

(4) After his rejection Defendant Employer continued to employ persons in those positions with qualifications who were less qualified than Plaintiff Brand.

Brand v. Boise Southern Company, Slip opinion (W.D. La. 1981), Appendix at 40. See *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248 (1981); *McDonnell-Douglas Corp. v. Green,* 411 U.S. 791 (1973).

Assuming Plaintiff Brand established a prima facie case, Defendant Boise articulated and proved through competent and credited testimony a legitimate non-discriminatory reason for refusing to return Plaintiff Brand to work.[3] Plaintiff utterly failed to meet his ultimate burden of persuasion, that Defendant's articulated reason was unworthy of credence or a pretext for discrimination.

The Court of Appeals agreed that the Trial Court's findings concerning Defendant's refusal to return Plaintiff to work constituted a legitimate, non-discriminatory reason for Defendant's action. Further, the Appeals Court held "Brand has failed to demonstrate that this (sic) reason was a pretext for discrimination." (Appendix at 24.) Plaintiff Brand "utterly failed to cast doubt" on Defendant's articulation of non-discriminatory reasons for its actions. (*Id.* at 25.)

In the face of these findings by the Trial and Appeals Courts, Plaintiff urges this Court to hold, apparently as a matter of law, that an Employer cannot legitimately refuse to return to work an employee who admittedly suffered a mental disorder, even though:

(1) the Employer only temporarily refused to return Plaintiff to work because Plaintiff failed to provide

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[3]The Trial Court so found. See: Findings of Fact number 17 and 18. (Appendix at 37).

Defendant with a medical evaluation other than the one which indicated a substantial chance of dangerous relapse. (Appendix at 37);

(2) the Employee's own doctor suggested there was only a 20% chance Plaintiff would not have a relapse if he returned to his job. (Appendix at 32);

(3) the record contains no evidence that white employees suffering or having suffered a mental disorder were treated more favorably than Plaintiff. (Appendix at 38);

(4) the record contains no evidence tending to establish that Defendant intentionally or purposefully treated Plaintiff differently on account of his race. (Appendix at 38);

(5) the Plaintiff was in fact returned to work when he presented a full release.

Although Plaintiff casts this issue as one of law the question in actuality hinges on the factual determination of whether the stated reasons for Defendant's actions were "pretext" for discrimination. At trial Plaintiff utterly failed to carry his burden of pursuading the Court that Defendant's articulated reason was a pretext for discrimination. The Trial Court carefully considered Plaintiff's evidence concerning physical as opposed to mental disabilities. Even so, the Trial Court rejected Plaintiff's conclusion that differences in treatment between physical and mental disabilities established pretext. Plaintiff now urges this Court to so rule. This argument is further undermined by the District Court's finding that in cases involving physical injuries the Company followed the same procedure of requiring releases in all but one instance, and the one exception occurred when the plant was new and no policy had yet been developed.

The articulation of non-discriminatory criteria for an employment decision properly focuses the Court's inquiry upon the legitimacy of the articulated reason. It is not a Court's province to substitute its judgment for the Employer's, absent Plaintiff establishing through a preponderance of the evidence that the Employer's articulated reason is a pretext for race discrimination. Plaintiff utterly failed to cast doubt on Defendant's articulated reason. The record substantially supports the sound

business decision to refuse to return Plaintiff to work absent a complete release. Plaintiff's race simply played no part in that decision.

CONCLUSION

Plaintiff's petition fails to present any significant issue to this Court. Rather, the petition requests this Court to review on essentially factual issue. Both lower courts rejected Plaintiff's factual argument. This decision is amply supported by the record and does not justify further review.

Respectfully submitted,

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CERTIFICATE

I hereby certify that three copies of this Opposition to Petition for Writ of Certiorari have been placed in the mail at the United States Post Office at New Orleans, Louisiana, properly addressed to counsel for Steven E. Brand, Hardy M. Parkerson, 807 Alamo Street, Lake Charles, Louisiana 70601, with sufficient first-class postage prepaid, this _____ day of May, 1982.

KEITH M. PYBURN, JR.